No. 896

Supreme Court of the United States

October Term, 1942

TEXAS LAND AND MORTGAGE COMPANY, LIMITED
Petitioner,

vs.

LON ALEXANDER MULLICAN, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

The loan contract in question required Respondent to repay the $38,000 in ten years with eight per cent per annum interest thereon, payable annually as it accrued, and in addition to pay all taxes annually assessed against said notes, and expressly stipulated for the lender to accelerate and mature the notes if the debtor failed to pay such interest and taxes as they accrued. (R. 26-27).

The Circuit Court of Appeals in this case found that

> "The total burden of stipulated interest plus taxes exceeded the 10% per annum maximum allowed by Texas law during five years of the loan period." (R. 268).

Based on such finding it held:

> "The contract was usurious under the Texas Statute construed by the courts of that state." (R. 268); 132 Fed. 2d. 242).

It in all things affirmed the judgment of the District Judge who had confirmed the Referee's judgment disallowing all interest on the claim of Petitioner. Of course the Referee, and the District Judge on Petition to Review, found the facts as quoted above and adjudged the loan contract usurious (R. 87-95; 164-172).

Mandate issued and went down to the Trial Court February 4th, 1943 "for such execution and further proceedings" to be had according to "right and justice." See Exhibit A, certified copy of Mandate hereto annexed. Such further proceedings was under Section 74 of the Bankruptcy Act and not under the Frazier-Lempke Act. (R. 3) In obedience to said Mandate the Trial Court had a hearing on February 10th, 1943, and rendered final judgment closing the Bankruptcy proceedings and returned to Respondent all property which included the real estate that was mortgaged to the Petitioner as security for its alleged debt. (See exhibit B, certified copy of final Judgment in No. 342 in Bankruptcy). All costs have been paid and the final judgment sought to be reviewed in this case has in all things been executed. id.

REASONS WHY THIS COURT'S JURISDICTION SHOULD NOT BE EXERCISED TO GIVE PETITIONER "ANOTHER HEARING" ON WHETHER THE LOAN CONTRACT WAS USURIOUS

1.

A contract for repayment of the money loaned providing for the debtor to pay more than ten per cent per annum interest for one or more years of the loan period is usurious under Texas law.

2.

This Court's jurisdiction should not be exercised to grant Certiorari to review a Judgment of the Circuit Court whose Mandate has gone down to the Trial Court and final Judgment rendered in obedience thereto without any stay sought by Petitioner.

ARGUMENT AND AUTHORITIES IN SUPPORT OF FIRST REASON

The Circuit Court's holding that the loan contract in question is usurious under Texas law is the settled law in Texas.

Article 16, Section 11, Texas Constitution;

Article 5071 R. S. of Texas;

Shropshire v. Commerce Farm Credit Co. 280 S.W. 181 (Com. of App.);

Shropshire v. Commerce Farm Credit Co. 30 S. W. 2d. 285 (Sup. Ct.);

Shropshire v. Commerce Farm Credit Co. 39 S. W. 2d. 11 (Sup. Ct.);

Commerce Trust Co. v. Ramp 116 S.W. 2d. 144 (Civ. App.);

Commerce Trust Co. v. Ramp 138 S.W. 2d. 533 (Sup. Ct.);

Dallas Trust and Savings Bank v. Brashear 39 S.W. 2d. 148 (Civ. App.);

Dallas Trust and Savings Bank v. Brashear 65 S.W. 2d. 288;

Texas Land & Mortgage Co. Ltd. v. Mullican 132 Fed. 2d, 242 and the authorities therein cited. (R. 268).

The foregoing authorities directly hold that a written loan contract requiring the debtor to pay interest in excess of ten per cent per annum for one or more years of the loan period is usurious even though the total interest to be paid does not exceed ten per cent if calculated for the entire period of the loan. In the Ramp case, supra, our Texas Court of Civil Appeals had for determination a loan contract requiring the debtor to pay interest on a loan of $50,000 in excess of ten per cent per annum for each of the first four years of the ten year period and six and one-half per cent per annum for the remaining years. The total interest to be paid if spread over the entire period would be nine per cent. By reason of the exaction of more than ten per cent for each of

the first four years it was condemned as usurious in this language:

> "This arrangement unquestionably made the contract usurious. . . . it is plainly expressed in the obligatory portion of the contract. Such contracts must be determined by the statutory limitation of ten per cent for the use of the borrowed money for a term of one year. If the interest contracted to be paid exceeds that rate, the contract is usurious and the rule under which the courts must give to the contract a construction that will make it legal, if it be fairly susceptible of such construction, does not justify them in ignoring the very terms that have been adopted by the parties and which make the contract illegal under the provisions of the statute." (Gyrmes, 63 S.W. 860. Shropshire Cases, 30 S.W. 2d. 282, 39 S.W. 2d. 11.)

Our Supreme Court reviewed the holding on a Writ of Error and in all things affirmed the Court of Civil Appeals in this language:

> "his holding was based on the ground that the additional two and one-half per cent interest on the principal of the loan was "squeezed" into four annual payments of $3125.00 each, instead of being spread over the ten year period of the loan, and this resulted in making the rate for the first four years in excess of ten per cent per annum. This holding of the Court of Civil Appeals is so obviously correct that it becomes unnecessary to discuss the question." (138 S.W. 2d. 533)

In the Shropshire case, supra, our Commission of Appeals had before it a loan contract requiring the debtor to

pay on a loan of $5,000 interest in excess of ten per cent for each of the first five years of the loan period and six per cent for the remaining years. The court held the loan contract usurious in this language:

> "The interest contract, embodied in the notes, etc., require a payment of $504, at the end of each of the first 5 years, a total of $2,520, which is the equivalent of 12 per centum per annum, and a payment of $252 at the end of each of the last 5 years, a total of $1,260, the equivalent of 6 per centum per annum. The maximum rate prescribed by the Constitution, chap. 11, art. 16 and the statute (Article 5071, R. S. 1925), being 10 per centum, per annum the exactions thus provided for are usurious, at all events prima facie, and, we believe, absolutely. * * *
>
> "The lawful maximum of 10 per centum per annum is exceeded when the contract requires payment of 12 per centum for any year of the term. Two elements enter into the standard of measurement, viz. a year (per annum) as the unit of time and 10 per centum of the principal borrowed as the amount for that period. The terms employed in the Constitution and Statute are plain, and, while cases may be found to support a contention against the position here taken, we believe they are not subject to a meaning different from that above given."

Our Supreme Court expressly affirmed the holding of the Commission of Appeals in two written opinions reported in 30 S.W. 2d, 285 and 39 S.W. 2d 11.

Soon after the Shropshire cases were decided our Texas Court of Civil Appeals had the same question for deter-

mination. Dallas Trust and Savings Bank v. Brashear, 38 S.W. 2d, 148. An excess over ten per cent interest was required to be paid for each of the first five years of the loan period and six per cent for the remaining years. If the interest was spread over the ten year term of the loan it would not equal ten per cent. In other words the total interest to be paid lacked the sum of $386.67 to equal ten per cent interest. The Supreme Court reviewed said case and affirmed the holding of the Court of Civil Appeals holding the loan contract usurious. Here is what the Court had to say on this question:

> "The contract is usurious on its face or in its incipiency because it exacts of the borrower more than 10 per cent per annum for each of the first five years of the loan, and, of course, exacts a total payment of interest in excess of 10 per cent per annum for the first five years of the loan contract. An analysis of the loan contract and the various payments exacted by it of the borrower condemns it in its incipiency as an usurious one. It is true as contended by appellants that for the remaining five years of the loan contract there will be collected only seven per cent interest per annum on $2,400, or $168 annually, a total of $840, which if added to the $1,479.33 interest collected for the first five years would make a total sum of $2,319.33, or about 9 per cent for the entire period of the loan contract. But the vice in the contract as written is the fact that it exacts more than 10 per cent per annum for each of the first five years of the loan.
>
> "Article 16, chap. 11, of the state Constitution, and Articles 4979 and 4980, R.S., enacted pursuant

> to the constitutional provision, declare all contracts whatsoever which may in any way, directly or indirectly, stipulate for a greater rate of interest than 10 per cent per annum to be void to the amount or value of the interest.
>
> "The Supreme Court held in Galveston & H. Investment Co. v. Grymes, 94 Tex. 609, 63 S.W. 860, 64 S.W. 778, that, to determine the question of usury in a contract, it must be tried by the statutory limitation of 10 per cent per annum for the use, forbearance, or detention of the money for one year."

The foregoing holdings of our Texas Courts on the question are the last expressions of said court, holding that

> "The lawful maximum of 10 per cent per annum is exceeded when the contract requires payment of interest in excess of 10 per cent per annum for any year of the term."

The Circuit Court of Appeals, Fifth Circuit, recognized this to be the Texas law in Atwood v. Deming, 55 Fed. 2nd. 180 and Cole v. Franklin Life Insurance Company, 108 Fed. 2nd. 130, 132. The Texas Constitution and Statute on usury were considered and construed in each of the foregoing cases cited and certainly it is the settled law in Texas that the contract in question is usurious. (See Appendix 1 and 2 for the Constitution and Statute.)

The Nevels-Harris case, 102 S.W. 2d, 1046, cited at pages 4 and 8 of the Petition for Certiorari has no application and certainly does not hold contrary to the fore-

going decisions we have quoted. In said case the $320 was never paid. The Court says so. The court said that more than ten per cent per annum was never actually paid or collected and it further found that the contract did not require the debtor to pay interest in excess of ten per cent for any year of the loan period; that the language of the loan contract forbid the lender to collect more than ten per cent for any year of the loan period and likewise did it forbid any interest in excess of ten per cent for the entire period of the loan. The Court pointed out two savings clauses in the contract to save it from being adjudged usurious and then to cinch the matter in the last paragraph of its opinion the court said:

> "Of course we do not mean to hold that a person may exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done."

The same can be said of the Simpson-Eubanks case cited by Petitioner at page 9 of its Petition. In said case the contract did not provide for payment of interest in any one year of the loan contract in excess of ten per cent. It is to be noted that in the case at bar Petitioner had no saving clause in its contract to save it from usury, but it did have an acceleration clause, referred to on page 1 of this Brief (R.26). According to Petitioner's argument the loan in question of $28,000 could be made for

a period of ten years beginning December 2nd, 1922, and due December 2nd, 1932, with interest at the rate of ten per cent per annum and for all of the interest for the ten year period, amounting to $38,000 to be due December 2nd, 1923, one year after its date. Thus debtor would borrow $38,000 on December 2nd, 1922, pay the entire interest one year later, on December 2nd, 1923, or $38,000 and still owe the lender $38,000 principal on December 2nd, 1932. Certainly such a loan contract is usurious under Texas law, contrary to the argument made by Petitioner at page 12 of its Petition. To hold otherwise would be to substitute fiction for fact. It would nullify our Constitution and Statute against usury.

In the case at bar the contract required Respondent Mullican to pay interest in excess of ten per cent per annum "during five years of the loan period," and such contract is certainly usurious under Texas law.

In a footnote, page 12 of the Petition, it is asserted that the Court who decided this case did not include any Judge from Texas. The implication is that the Justices were not qualified to interpret and apply the Texas usury law to the facts in this case. We reply to the assertion:

1. Justice Hutcheson is a member of the Court, a resident and native Texan, licensed to practice law by the Texas authorities more than thirty years ago and the Court records will reflect that he actively practiced his profession with some degree of success at Houston, Texas, until he was appointed and qualified as a member of the United States Circuit Court of Appeals, Fifth Cir-

cuit, some eighteen years ago. He delivered the opinion of the Court January 13th, 1932, in the case of Atwood v. Deming Investment Company, 55 Fed. 2d. 180. It involved the Texas usury law and in particular whether the loan contract was usurious in requiring the debtor to pay more than ten per cent per annum interest for one or more years of the loan period. He held the contract usurious and cited as his authority for such holding the Shropshire cases, supra among others. Later, on December 13th, 1939, he delivered the opinion of the Court in the case of Cole v. Franklin Life Insurance Company, 108 Fed. 2d. 130, and said case involved the usury law of the State of Texas and in particular did it involve usury like it is in the case at bar where the contract required the debtor to pay the taxes on the note in addition to the stipulated interest. He again discussed the Shropshire cases, supra, and applied the Texas usury law as did Justice McCord who delivered the opinion in the case at bar. Surely Justice Hutcheson was qualified to so interpret and apply the Texas usury law to the case at bar. He being a member of the Court we infer he in all things adopted the Court's opinion as the settled law in Texas on the question of law involved. In any event the three Justices who delivered the opinion likely conferred with him about the question before delivery thereof.

2. Judge Davidson was the District Judge who reviewed the Referee's decision and proceedings, holding the contract usurious in the case at bar. He is a native Texan and lawyer of some repute, was qualified and li-

censed to practice under the laws of Texas more than thirty years ago, has actively engaged in the practice of law in Texas for more than thirty years and this with some degree of success. His opinion reflects some knowledge of the usury law and how to apply it (R. 164-171).

3. Justice W. D. Girand was the Referee who tried this case. He is likewise a Texas lawyer, licensed and qualified under the laws of Texas and has actively engaged in the practice for more than thirty years, and the Court records reflect that he has practiced with some degree of success. He adjudged the loan contract in question usurious (R. 87-95). We thus find complete harmony of the three Judges named in interpreting and applying the usury law of Texas to the loan contract in question, and all holding said contract usurious because "the lawful maximum of 10 per cent per annum is exceeded when the contract requires payment of interest in excess of 10 per cent per annum for any year of the term." The authorities cited, supra, directly so hold.

ARGUMENT IN SUPPORT OF REASON TWO

Petitioner did not ask the Circuit Court of Appeals to stay the Mandate in this case nor did it ask the Trial Court to do so when the latter received it and obeyed the same by having a final Hearing on February 10th, 1943, and rendered Judgment closing the estate and reinvesting title to the property in Respondent. The law

of estoppel should apply against Petitioner to invoke this Court's jurisdiction to review the case after the judgment has been fully executed. It was a party to the proceedings. The Trial Court thus performed its duty in obedience to the Mandate and Petitioner acquiesced therein without a Motion for stay of further proceedings to enable it to petition this Court for Certiorari. Said Court divested the title of the Trustee in Bankruptcy and reinvested same in Respondent. In such a situation a Petitioner should not invoke the exercise of this Court's jurisdiction to grant it a Petition for Certiorari on a Judgment that has been finally executed without any motion or prayer for a stay thereof to enable it to petition for such a writ.

Wherefore Respondent prays that the Writ be in all things denied or dismissed for want of Jurisdiction and in the alternative that the opinion and Judgment of the Circuit Court be in all things summarily affirmed.

C. C. Crenshaw

(C. C. CRENSHAW) and

W. W. Campbell

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United States Circuit Court of Appeals

For the Fifth Circuit

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable the Judge of the District Court of the United States for the Northern District of Texas, GREETING:

WHEREAS, lately in the District Court of the United States for the Northern District of Texas, before you, in a cause entitled:

"IN THE MATTER OF LON ALEXANDER MULLICAN, Debtor, and TEXAS LAND & MORTGAGE COMPANY, Limited, Creditor, No. 342 in Bankruptcy," the following Judgment was made and entered, to-wit:

> "The above cause came before this Court on a Petition to Review a Judgment of the Referee entered on November 10th, 1941, wherein the claim of the creditor, Texas Land & Mortgage Company, Ltd., after being re-examined and re-classified, was disallowed. The pleadings, the evidence and all proceedings before the Referee, together with the Petition to Review by the creditor and the reply thereto by the debtor, were submitted to the Court; also the attorneys for the respective parties submitted to the Court oral argument and written brief. The Court took all such proceedings under advisement and after considering same, reviewing all of the proceedings,

the Court is of the opinion that there was no error in the proceedings before the Referee and that the Judgment and Order of said Referee disallowing the claim of the creditor should be in all things sustained and his said Order in all things confirmed. The reasons for such opinion of this Court more fully appears in its opinion in this cause delivered April 10, 1942. It is Therefore Ordered, Adjudged and Decreed by the Court that the Judgment and Order of the Referee entered in this cause on November 10th, 1941, be in all things sustained and confirmed, to which judgment and ruling of the Court the Texas Land & Mortgage Company, Ltd., creditor, duly excepted, and said creditor gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

Entered this the 23rd day of April, 1942.

(Signed) T. WHITFIELD DAVIDSON,
Judge Presiding."

as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Texas Land and Mortgage Company, Limited * * * agreeably to the Act of Congress, in such case made and provided, full and at large appears.

AND WHEREAS, in the present term of November in the year of our Lord one thousand nine hundred and Forty-two, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here Ordered, Adjudged and Decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is Further Ordered, Adjudged and Decreed that the appellant, Texas Land and Mortgage Company, Limited, and the surety on the appeal bond herein, Fidelity and Casualty Co., of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

December 14, 1942.

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal * * * notwithstanding.

WITNESS the Honorable Harlan Fiske Stone, Chief Justice of the United States the 4th day of February, in the year of our Lord one thousand nine hundred and forty-three.

(Signed) OAKLEY F. DODD,
Clerk, U. S. Circuit Court of
Appeals, for the Fifth Circuit.

(ENDORSED: No. 10344. United States Circuit Court of Appeals for the Fifth Circuit. November Term, 1942. Texas Land and Mortgage Company, Limited, Appellant, vs. Lon Alexander Mullican,

Debtor, Appellee. MANDATE. Filed 6 day of Feb. 1943. Geo. W. Parker, Clerk by Olive Fluke, Deputy.)

In Re:

LON ALEXANDER MULLICAN, NO. 342 IN BANKRUPTCY. Debtor.

On this the 10th day of February came on to be considered the above entitled cause, and it appearing that the debtor has complied with all the requirements of the court and that all debts of the debtor has been paid as provided in said extension agreement, and the mandate from the Circuit Court of Appeals in the case of the debtor vs. Texas Land & Mortgage Co., affirming the decision of the Court, having been filed, and that there is nothing further remaining to be done with reference to said estate.

It is Ordered that said estate be closed and that the debtor's property be returned to him and the control and jurisdiction of this Court over said property cease, all claims listed at the time of the filing of said petition having been fully paid and satisfied.

Done a Lubbock, Texas, this the 10th day of February, A. D. 1943.

(Signed) W. D. GIRAND,
Referee.

EXHIBIT B

District Court of the United States

OF AMERICA

Northern District of Texas

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify the foregoing to be a true and correct copies of the Mandate of the United States Circuit Court of Appeals; and Final Order of Honorable W. D. Girand, Referee in Bankruptcy;

I further certify that all costs are paid in this cause. in cause No. 342 in Bankruptcy, entitled IN THE MATTER OF LON ALEXANDER MULLICAN, Debtor as fully as the same remains on file and of record in said cause, in my office at Lubbock, Texas.

IN WITNESS WHEREOF, I hereunto subscribe my name, and affix the seal of said Court, at my office in the city of Lubbock, Texas, in said District, this 13th day of April in the year of our Lord one thousand nine hundred and Forty-Three. and of American Independence the 166th year.

GEO. W. PARKER,
Clerk of said Court.
By OLIVE FLUKE,
Deputy.